

**Before the
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
Marina del Rey, California**

In the Matter of

DNSO Working Group A
Final Report to the ICANN Board

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**Comments of the
Office of Advocacy
U.S. Small Business Administration**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these Comments on the DNSO Working Group A: Final Report to the ICANN Board (“Final Report”),¹ in preparation for the August 24-26 meeting in Santiago, Chile. Advocacy supports a mandatory Uniform Dispute Resolution Process (“UDRP”) that is narrowly tailored to rectify situations of blatant abusive registrations. Furthermore, while Advocacy agrees with the WG-A decision that several issues in the report merit further discussion, Advocacy questions whether the World Intellectual Property Organization (“WIPO”) is the appropriate forum for these clarifications and recommends instead that the Domain Name Supporting Organization (“DNSO”) consider the clarifications. Regardless of which body handles the clarification, it should consider the role of small businesses and impact these rules will have upon them.

The United States Congress established the Office of Advocacy in 1976 by Pub. L. No.

¹ Internet Corporation for Assigned Names and Numbers, *DNSO Working Group A: Final Report to the ICANN Board* (rel. August 3, 1999) <<http://www.icann.org/dns/wga-final-report.htm>> (last visited August 23, 1999).

94-305² to represent the views and interests of small business within the U. S. federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in U.S. Federal agencies' policies, and communicating these proposals to the agencies.³

Small businesses are a crucial element of the U.S. economy and the Internet. In 1998, there were 23 million small businesses in the United States, who represent more than 99 percent of all employers in this country. Small businesses employ 52 percent of private workers and employ 38 percent of private workers in high-tech occupations. Virtually all of the net new jobs in the United States were provided by small businesses.

Small businesses use of the Internet is rapidly expanding. In the past two years, small businesses with access to the Internet has doubled from 21.5 percent to 41.2 percent. Thirty-five percent of small businesses maintain a Web site and one in three do business transactions through their site. Furthermore, small businesses have registered 1.8 million domain names. Any policy that detrimentally affects the ability of these small businesses to use the Internet would have a significant impact on this nation's economy and limit the effectiveness of the Internet as a tool of business and commerce.

1. Advocacy Supports a Limited and Narrowly Tailored UDRP.

As Advocacy stated in its letter to ICANN in preparation of its meeting in Berlin on May 27, 1999, Advocacy supports a limited and narrowly tailored arbitration process designed to counter cybersquatters.⁴ This limited use of an arbitration process was also the final

² Codified as amended at 15 U.S.C. §§ 634(a)-(g), 637.

³ 15 U.S.C. § 634(c)(1)-(4).

⁴ Comments of the Office of Advocacy, U.S. Small Business, to the *Final Report of the WIPO Internet Domain Name Process* (May 20, 1999).

recommendation of the WIPO.⁵ Advocacy concurred with the WIPO decision to the extent that the UDRP was limited to cybersquatting.

Advocacy is concerned about the WG-A's language, which seems to indicate that the UDRP could extend beyond cybersquatting at some point in the future. Specifically, WG-A states "For at least the balance of 1999, this UDRP should apply only to bad faith / abusive domain name registrations (cybersquatting) on a mandatory basis . . ."⁶ Advocacy believes that this language raises the possibility that at some point in the near future that a mandatory UDRP will be imposed on all domain name registrants.

Advocacy continues to be of the opinion that a far-reaching mandatory arbitration process will impose severe costs on small businesses and will create a disincentive for small businesses – both in the United States and globally – to connect to the Internet. A mandatory arbitration process would add a second level of litigation which would increase costs and burdens on a small business domain name registrant, as Advocacy discussed in its previous comments to ICANN.⁷

By providing an alternative to costly litigation, a voluntary UDRP may be prove beneficial to small businesses. However, it is unlikely that a large business who is a trademark holder will be content with an arbitration decision contrary to its position. Since the WG-A has recommended that the UDRP remain non-binding, a large trademark holder will certainly renew a challenge in court. Therefore, Advocacy is doubtful that a voluntary UDRP will be of much benefit to small businesses nor would it further ICANN's goal to provide an efficient and expedient alternative to litigation. Instead, it will act as an additional layer of litigation, adding costs and time to the process. Advocacy recommends that the DNSO discuss this fully and

⁵ Internet Corporation for Assigned Names and Numbers, *Final Report of the WIPO Internet Domain Name Process* (rel. April 30, 1999) <http://www.icann.org/wipo/wipo_report.htm> (last visited May 20, 1999).

⁶ *Final Report*, *supra* note 1.

permit public comment before taking any action on this matter.

2. DNSO Is a More Appropriate Forum than the WIPO for Clarifying Issues Presented by the WG-A.

Advocacy believes that the DNSO is a more appropriate forum for clarifying issues presented by the WG-A. The DNSO presents a much greater opportunity for public comment and a robust discussion due to its diverse membership. Furthermore, Advocacy is greatly concerned that WG-A's recommendation that the WIPO consult arbitrators and IP practitioners will create an unbalanced process, because of the lack of input from public interest sectors and domain name registrants who are not trademark holders.

The DNSO is a diverse body with representatives from commercial, non-commercial, Internet service providers, and intellectual property constituencies. Each of these groups will provide a valuable view point to clarifying the issues presented by WG-A. Therefore, Advocacy recommends that ICANN should refer the issues to the DNSO for clarification instead of to the WIPO.

3. Any Clarifications by the DNSO or the WIPO Should Consider the Role of Small Businesses and the Impact that these Proposals Will Have Upon Them.

Advocacy urges either the DNSO or the WIPO to consider the role of small businesses on the Internet and the impact that these clarifications would have on small businesses. The Internet is a powerful technology and offers tremendous possibility to small businesses. However, severe restrictions and regulations on Internet use will stunt the growth of small business use of this nascent technology.

WG-A's Final Report contains several requests for clarifications that will have far-reaching effect . The clarifications that Advocacy has identified as having the greatest impact on

⁷ Advocacy Comments, *supra* note 3.

small businesses are: (1) user's guide to the UDRP, (2) independent set of rules of the UDRP, (3) procedural time table, and (4) refinements articulate the standard of proof in paragraph 171 of the WIPO's Final Report to ICANN.⁸

Advocacy strongly supports WG-A's proposal to create user's guides to the arbitration process. User's guides are an excellent and efficient means of educating a vast number of people of the requirements and procedures of a UDRP. The United States Congress has also acknowledged the value of user's guides and has required all U. S. federal agencies to prepare a guide when they enact a rule that has a significant impact on a substantial number of small businesses.⁹ Advocacy encourages ICANN to adopt a policy to create user's guides.

Advocacy has reservations regarding the development of an independent set of rules for the UDRP not based on civil or common law. While this independent set of rules would create global uniformity, it also has the danger of creating a untouchable system that has no review or oversight and may disadvantage certain sectors and classes of entities – particularly those without an international presence. This provision should have the full notice, comment, and support of the affected constituencies, the DNSO, and the ICANN membership before it proceeds

Advocacy supports the Final Report's recommendation to re-examine the procedural timetable. Advocacy agrees that the three issues identified by WG-A have a possibility of unfairness and abuse. However, Advocacy does not agree with WG-A's decision to not recommend changing the notice provisions or extending the time table. As e-commerce continues to grow, small businesses will come to rely more and more on their Internet presence.

⁸ *WIPO's Final Report, supra* note 5.

⁹ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (codified as amended at 5 U.S.C. §§ 601-12).

A loss of a domain name could well doom these fledgling businesses. Therefore, even though a speedy resolution of a dispute is a concern, Advocacy believes that greater notice and longer period response times are necessary to the continued flourishing of the Internet.

Finally, Advocacy believes that the standard of proof in paragraph 171 should be further refined to better separate legitimate domain name use from abusive registrations.¹⁰ Advocacy asks that the DNSO or the WIPO consider the eight factors listed in the recently passed U.S. Senate Bill Anticybersquatting Consumer Protection Act.¹¹ Particular attention should be given to the sixth factor, which states that a offers to sell a domain name are abusive if the domain name is not being used or if there is no bona fide intention to use the domain name. This is absolutely crucial for small businesses. Often, small businesses will seek to avoid litigation by settling with larger parties. These settlements cover the cost of moving, informing their customer base, and redeveloping the new location. If ICANN seeks to encourage a expeditious and efficient means of resolving domain name disputes, offers for settlements should be encouraged and not used as evidence of trademark violation. Advocacy believes that the requirement of a bona fide intention to use the domain name will prevent abusive registrations from profiting from settlements.

Conclusion

Advocacy greatly appreciates the work the WG-A has done on this complicated and important issue area, and supports the Final Report's suggestion to create a mandatory UDRP narrowly tailored to blatantly abusive registrations. However, Advocacy believes that the DNSO is the appropriate body to handle the clarifications requested by the WG-A. Advocacy urges

¹⁰ *WIPO's Final Report*, *supra* note 5.

¹¹ S. 1255, 106th Cong. § 3 (1999).

ICANN to consider the needs and interests of small businesses who compose a large and still growing presence on the Internet.

Respectfully submitted,

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